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No. 02-575

In The

Supreme Court of the United States

NIKE, INC., *et al.*,

Petitioners,

v.

MARC KASKY,

Respondent.

On Writ Of Certiorari
To The Supreme Court Of California

BRIEF OF AMICUS CURIAE PRODUCT LIABILITY ADVISORY COUNCIL, INC. IN SUPPORT OF PETITIONERS

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United States v. United Foods, Inc., 533 U.S. 405 (2001) 5, 12

Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976) 5, 8, 14

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Ann Davis, *Plaintiffs: We'll Junk "Junk Science" Tag*, Nat'l L.J., Dec. 2, 1996, at A6, *available at* LEXIS, News Library, Papers File 21

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Bonner R. Cohen, *Scaring Up Money with False Attacks on Science*, Knight Ridder/Trib. Bus. News, Sept. 20, 2000, *available at* LEXIS, News Library, Papers File 21

Charles Ornstein, *Norplant Company Agrees to Settle Suits*, Dallas Morning News, Aug. 26, 1999, *available at* LEXIS, News Library, Papers File 24

David K. Martin, *Truth Prevails Over "Junk Science"*, Chi. Trib., Sept. 2, 1998, at 25, *available at* 1998 WL 2891543 21

Gina Kolata, *Panel Confirms No Major Illness Tied to Implants*, N.Y. Times, June 21, 1999, at A1, *available at* 1999 WL 30483238 22

Gina Kolata, *Will the Lawyers Kill Off Norplant?*, N.Y. Times, May 28, 1995, § 3, at 1, *available at* LEXIS, News Library, Northeast File 23

James R. Healey & David Kiley, *PR Company Comes Up with 2 Campaigns Taking SUVs to Task*, USA Today, Jan. 24, 2003, at 3B, *available at* LEXIS, News Library, Major Papers File 20

Leslie Laurence, *Your Perfect Birth Control . . . Blocked?*, Glamour, Sept. 1999 23

Michael Fumento, *A Confederacy of Boobs: How Special Interests, Assorted Ideologues, and a Sensationalist Press Torpedoed Breast Implants and Now Threaten Other Medical Devices*, Reason Magazine, Oct. 1995, *available at* LEXIS, News Library, Magazine File 21

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Michael Fumento, *Dwindling Implant Returns*, Wash. Times, Dec. 28, 1998, at A17, *available at* 1998 WL 3467312 21

Michael Fumento, *The FDA's Panel Did Not Recommend the Ban of Silicone Breast Implants*, Wash. Times, Jan. 21, 1999, at A18, *available at* 1999 WL 3076271 21

Peter W. Huber, Galileo's Revenge: Junk Science in the Courtroom (Basic Books 1991) 19

Peter W. Huber, *Junk Science in the Courtroom*, Forbes, July 8, 1991, at 68, *available at* 1991 WL 2802206 20

Peter W. Huber, *Manufacturing the Audi Scare*, Wall St. J., Dec. 18, 1989, *available at* 1989 WL-WSJ 457495 19

Walter Olson, *It Didn't Start with Dateline NBC*, Nat'l Review, June 21, 1993, *available at* http://www.walterolson.com/articles/crashtests.html 19

STATEMENT OF INTEREST[1]

The Product Liability Advisory Council, Inc. ("PLAC") is a non-profit association with 129 corporate members representing a broad cross-section of American and international product manufacturers. These companies seek to contribute to the improvement and reform of law in the United States and elsewhere, with emphasis on the law governing the liability of manufacturers of products. PLAC's perspective is derived from the experiences of a corporate membership that spans a diverse group of industries in various facets of the manufacturing sector. In addition, several hundred of the leading product liability defense attorneys in the country are sustaining (non-voting) members of PLAC. Since 1983, PLAC has filed over 600 briefs as amicus curiae in both state and federal courts, including this Court, to present the broad perspective of product manufacturers seeking fairness and balance in the application and development of the law, particularly as it affects product liability. A list of PLAC's corporate members is appended to this brief.

This case does not concern product liability law *per se*, but nonetheless is of particular importance to PLAC's members. Like all large institutions, PLAC's members have critics (and supporters) both in the public and in the press corps. The business of PLAC's members frequently becomes the focus of media attention. PLAC's members

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[1] No counsel for any party authored this brief in whole or in part, and no person or entity, other than the amicus curiae, its members, or its counsel, made a monetary contribution to the preparation or submission of the brief. The written consent of the parties to the filing of this brief has been filed with the Clerk of Court.

also from time to time are defendants in high-profile lawsuits.

PLAC's members must be able to respond to the attacks made on them in the press and elsewhere. If those responses could routinely give rise to lawsuits, much like the lawsuit here, PLAC's members would be deterred from responding to public attacks, even when those attacks are frivolous. Such chilling of corporate speech not only would deprive PLAC's members of their constitutional right to speak in their own defense, but also would impoverish the public debate on important issues.

SUMMARY OF ARGUMENT

PLAC submits this brief for two purposes. First, PLAC explains why the Court should adhere to its established definition of commercial speech as "speech that does no more than propose a commercial transaction." (That definition will be referred to herein as the "no more than" definition.) Second, PLAC describes how the California court's decision, unless reversed, will be abused by the plaintiffs' bar. PLAC is uniquely qualified to present an analysis relating to plaintiffs' lawyers, as much of its work during the past two decades has involved advocacy against certain strategies and tactics used by the plaintiffs' bar.

This case provides an opportunity for the Court to reinforce its adherence to the "no more than" definition. Plaintiff conceded below that, if Nike's challenged statements are not commercial speech, then his complaint should be dismissed. Nike's statements could not be characterized as commercial speech under this Court's "no more than" definition. The Supreme Court of California,

however, disregarded that definition. Instead, it created a new definition that expands the commercial speech category to include virtually any statement that a company makes about itself, its products or its services, regardless of the venue in which the statement is made. This case should be resolved by rejecting the California court's unprecedented definition, and by reaffirming the "no more than" definition.

The "no more than" definition is broad enough so that it serves the underlying purpose of the commercial speech exception to general First Amendment principles. Commercial speech receives less than full constitutional protection because it is inextricably tied to commercial transactions, an area traditionally subject to the police power. Thus, it is perfectly logical that the commercial speech exception should extend only to speech that does no more than propose a commercial transaction.

Further, the "no more than" definition is narrow enough so as to not lead to inadvertent suppression of speech deserving of full First Amendment protection. In particular, that definition excludes speech that is part of the public discourse. The First Amendment forbids government from silencing voices in the public discourse, regardless of whether the speakers are commercial or noncommercial entities.

Moreover, reaffirmation of the "no more than" definition will not compromise government's legitimate exercise of its power to regulate health and safety statements on products. Members of this Court recently have expressed concern about whether that power will be limited unduly by commercial speech law. To the contrary, reinforcement of the "no more than" definition will enhance public

knowledge about product health and safety issues, by ensuring that the public hears from all knowledgeable and interested parties on those issues.

Turning to the second purpose of this brief, PLAC describes below how the California court's decision will provide an unacceptable boon to the plaintiffs' bar. Unless that decision is reversed, the plaintiffs' bar will release a torrent of abusive claims under California's Unfair Competition Law. Those claims will not benefit anyone but the plaintiffs' bar, and will cost our nation both socially and economically.

The decision below also should be reversed because it otherwise will cause the plaintiffs' bar to increase its extrajudicial use of the media to gain an advantage in litigation. The plaintiffs' bar has a long-standing practice of using the media to influence judges, potential jurors, and regulators on product safety issues. With the knowledge that the California court's decision will chill the countervailing speech of corporate speakers, the plaintiffs' bar will feel free to step up its use of the media.

In short, the decision below contradicts this Court's commercial speech law, will impoverish the public discourse on important issues, and will benefit nobody except plaintiffs' lawyers. The decision should be reversed.

ARGUMENT

I. THIS COURT SHOULD REITERATE AND REINFORCE ITS DEFINITION OF COMMERCIAL SPEECH AS "SPEECH THAT DOES NO MORE THAN PROPOSE A COMMERCIAL TRANSACTION"

A. Precedent Supports Continued Use of the "No More Than" Definition, and Provides No Justification for the California Court's Definition

A consistent definition of "commercial speech" has emerged from this Court and the federal circuit courts. Commercial speech is "speech that does no more than propose a commercial transaction."

The Court adopted the "no more than" definition in its seminal commercial speech case, *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976). Although the Court has experimented with other definitions, it returned to and settled on the "no more than" definition in its two most recent commercial speech decisions. *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 122 S. Ct. 1497, 1503 (2002); *United States v. United Foods, Inc.*, 533 U.S. 405, 409 (2001) (stating commercial speech is "usually defined as speech that does no more than propose a commercial transaction"); *see also City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 422-23 (1993).

The federal circuit courts, obligated as they are to follow this Court, generally have understood the "no more than" definition to be controlling. *See, e.g., Mattel, Inc. v. MCA Records, Inc.*, 296 F.3d 894, 906 (9th Cir. 2002) ("If speech is not 'purely commercial' – that is, if it does more

than propose a commercial transaction – then it is entitled to full First Amendment protection."); *Goldberg v. Cablevision Sys. Corp.*, 261 F.3d 318, 326 (2d Cir. 2001); *CPC Int'l, Inc. v. Skippy, Inc.*, 214 F.3d 456, 462 (4th Cir. 2000); *U.S. West, Inc. v. FCC*, 182 F.3d 1224, 1232-33 (10th Cir. 1999); *S.O.C., Inc. v. County of Clark*, 152 F.3d 1136, 1143-44, *amended by* 160 F.3d 541 (9th Cir. 1998).

The California court, however, disregarded this Court's definition and instead invented a complicated three-part test. Under that test, three elements must be considered: the speaker, the intended audience, and the content of the message. All three elements are described in extraordinarily broad terms by the court.

First, the "speaker" element of the test will be met whenever the speaker is "someone engaged in commerce" or "someone acting on behalf of a person so engaged." *Kasky v. Nike, Inc.*, 27 Cal. 4th 939, 960 (Cal. 2002).

The second element – the "intended audience" for the speech – is similarly broad. This element is satisfied if the intended audience is "likely to be actual or potential buyers or customers of the speaker's goods or services, or persons acting for actual or potential buyers or customers, or persons (such as reporters or reviewers) likely to repeat the message to or otherwise influence actual or potential buyers or customers." *Id.*

The third element – the "content" of the speech – is satisfied if the "speech consists of representations of fact about the business operations, products, or services of the speaker (or the individual or company that the speaker represents), made for the purpose of promoting sales of, or other commercial transactions in, the speaker's products or services." *Id.* at 961. All a plaintiff's lawyer would have

to allege is that every statement made by a corporation is for the ultimate purpose of promoting sales.

Practically speaking, the California court's test would include virtually any statement made by a commercial enterprise concerning itself, or its products or services, that likely will be heard by, or repeated to, potential customers. That definition arguably would cover a wide range of statements that have nothing to do with the proposal of a commercial transaction – such as a company's statements about the effect of proposed regulations on its business, its responses to a reporter writing a story about the environmental or health impact of the company's manufacturing processes, and its statements to the press about a pending lawsuit. As Justice Chin explained in his dissent below, the majority's broad definition of commercial speech impermissibly contradicts this Court's "no more than" definition. *Id.* at 973-74.

In sum, the overwhelming weight of authority supports application of the "no more than" definition in this case, and rejection of the California court's unprecedented definition. The next section of this brief explains why the "no more than" definition is not only controlling, but also correct.

B. The "No More Than" Definition Serves the Underlying Purpose of the Commercial Speech Doctrine

In order to understand why the "no more than" definition makes sense, it is necessary to consider the underlying justification for the commercial speech doctrine. That doctrine is an exception to the usual rule that all content-based restrictions on speech are presumed

unconstitutional and reviewed under a strict scrutiny standard. *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 387-88 (1992). Justice Stevens summarized the reasons for that exception in the principal opinion in *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 499 (1996):

> [T]he State's power to regulate commercial transactions justifies its concomitant power to regulate commercial speech that is "linked inextricably" to those transactions. [*Friedman v. Rogers*, 440 U.S. 1, 10 n.9 (1979); *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978)] (commercial speech "occurs in an area traditionally subject to government regulation"). As one commentator has explained: "The entire commercial speech doctrine, after all, represents an accommodation between the right to speak and hear expression *about* goods and services and the right of government to regulate the sales *of* such goods and services." [Laurence H. Tribe, *American Constitutional Law* § 12-15, at 903 (2d ed. 1988)].

Thus, the sole justification for government's extraordinary power to regulate commercial speech is the relation of that speech to commercial transactions. The "no more than" definition fits perfectly with that justification. Speech is covered by the "no more than" definition only when it is part and parcel of a commercial transaction.

The classic example of speech that falls within the "no more than" definition is set forth in *Virginia State Board*: "'I will sell you the X prescription drug at the Y price.'" 425 U.S. at 761. Such speech is integral to the proposed commercial transaction. The likely response to the example from *Virginia State Board* is purely economic conduct – the consumer either will buy or not buy that prescription

drug. As discussed below, however, speech that goes beyond the mere proposal of a commercial transaction is more likely to be responded to with additional speech, not just economic conduct, and so must receive full constitutional protection.[2]

C. The "No More Than" Definition Properly Excludes Speech that Is Part of a Public Discussion or Debate

Fundamental First Amendment values are put at risk by a definition of commercial speech broader than the "no more than" definition. When a speaker's message does more than propose a commercial transaction, that message may be the first step in a public discussion. Protection of such discussion is at the heart of the First Amendment. *See Consol. Edison Co. of N.Y., Inc. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 530 (1980). As this Court has explained, the First Amendment removes "governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity." *Cohen v. California*, 403 U.S. 15, 24 (1971).

This case provides a helpful illustration of these principles. Plaintiff does not dispute that Nike's statements do more than propose a commercial transaction. Those statements are part of a public discussion between

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[2] Because PLAC believes Nike's speech is noncommercial, it does not express an opinion herein as to whether commercial speech should receive full constitutional protection.

Nike, its critics, and its supporters about labor conditions in overseas factories where Nike's products are manufactured and, more generally, about the impact of American corporations on labor conditions in the developing world. Such public discussion clearly warrants full First Amendment protection. As this Court has stated, "[f]ree discussion concerning the conditions in industry and the causes of labor disputes appears to us indispensable to the effective and intelligent use of the processes of popular government to shape the destiny of modern industrial society." *Thornhill v. Alabama*, 310 U.S. 88, 103 (1940).

The California court, however, has created a new definition of commercial speech that would allow judges in California to interfere with public discussion based on their view of truth and falsity. In this case, plaintiff asks the California judiciary to restrain Nike's speech based on plaintiff's allegations that Nike has introduced false statements into the public debate about overseas labor conditions. But this Court has declared that, "erroneous statement is inevitable in free debate, and . . . must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive.'" *New York Times Co. v. Sullivan*, 376 U.S. 254, 271-72 (1964) (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)).

Moreover, the constitutional presumption against governmental interference with public debate does not vary based on the commercial motivation of a participant in that debate. No doubt, Nike has a commercial motivation in defending its labor practices. But "[c]orporations and other associations, like individuals, contribute to the 'discussion, debate, and the dissemination of information and ideas' that the First Amendment seeks to foster." *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal.*, 475 U.S. 1,

8 (1986) (quoting *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 783 (1978)). If statements from a commercial speaker are deserving of less weight, that is for the audience to decide, not the government. "[T]he people in our democracy are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments. They may consider, in making their judgment, the source and credibility of the advocate." *Bellotti*, 435 U.S. at 791-92; *see also Consol. Edison*, 447 U.S. at 534.

The threat posed by plaintiff's argument is not limited to direct interference with ongoing public debate, but also includes the danger that commercial entities will be deterred from even entering the debate. *See Button*, 371 U.S. at 433 ("The threat of sanctions may deter . . . almost as potently as the actual application of sanctions"). The speech of corporations, just like that of individuals, is chilled by the risk of court-imposed liability for that speech. *Bellotti*, 435 U.S. at 786 n.21. Management often would choose not to take such a risk and "[m]uch valuable information which a corporation might be able to provide would remain unpublished." *Id.* "'[T]he free dissemination of ideas [might] be the loser.'" *Id.* (brackets in original; citations omitted).[3]

In sum, the "no more than" definition of commercial speech appropriately excludes speech that is critical to public discussion and debate. If this Court were to abandon that definition, it would become far easier for government –

[3] Importantly, PLAC does not argue that commercial entities should be immune from liability for their false advertising. Companies can be sued for false advertising under the UCL, the Lanham Act or the FTC Act.

and plaintiffs' lawyers acting in the name of government – to silence the voices of commercial entities, voices that are particularly important in our free market economy. For this reason alone, the California court's unprecedented and overbroad definition of commercial speech should be rejected.

D. Reaffirmation of the "No More Than" Definition Will Not Unduly Restrict Government's Regulation of Health and Safety Statements

One aspect of the definitional issue, although not implicated directly by this case, merits special attention. Members of this Court have expressed concern recently about the interaction between the commercial speech doctrine and the government's ability to regulate health and safety statements on products. *See W. States Med. Ctr.*, 122 S. Ct. at 1509-10 (Breyer, J., dissenting); *United Foods*, 533 U.S. at 428 (Breyer, J., dissenting). Reaffirmation of the "no more than" definition, however, will enhance, not reduce, public knowledge about the health and safety of products.

A question that could be raised about the "no more than" definition is whether corporate statements about health and safety will be deemed to fall outside that definition, and instead be categorized as fully protected speech. The answer is that most corporate statements about health and safety, when made in the context of a commercial transaction, should qualify as commercial speech under the "no more than" definition. Put another way, and as discussed more fully below, commercial speech law generally should apply to both regulations that restrict what companies can say and regulations that require

disclosures by companies about health and safety issues. These two types of regulations will be considered in turn.

The "no more than" definition, by its terms, includes statements that a company makes to consumers to persuade them to buy a particular product. Such statements are part of the proposal of a commercial transaction. Thus, when a company tells consumers something about the health or safety of its product in connection with its proposal that they buy the product, those statements qualify as commercial speech. It follows that government could regulate such statements, to make sure that they are not actually or potentially misleading, subject to the lesser First Amendment scrutiny accorded commercial speech under the *Central Hudson* test.

The same result should apply to governmental regulations designed to prevent misleading omissions of health or safety information. The analysis would be that, absent the mandated disclosure, the proposal of the commercial transaction will be misleading. Again, such mandated disclosures should be reviewed by the courts under *Central Hudson*.[4]

Strict scrutiny, and not *Central Hudson*, should apply, however, when government attempts to restrict what a corporation says about health and safety issues outside of

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[4] This analysis assumes that the mandated disclosure is not a matter of common knowledge. If the disclosure were common knowledge, then it would not serve to protect the public from being misled. Any attempt by government to require a company to make a disclosure that either is common knowledge, or that is otherwise not designed to protect the public from being misled, should be reviewed under strict scrutiny. *See Wooley v. Maynard*, 430 U.S. 705 (1977).

the context of the proposal of a commercial transaction. For example, government should have to satisfy strict scrutiny review if it wishes to prohibit companies from answering press inquiries about product safety issues.

By excluding such speech from the category of commercial speech, the "no more than" definition serves to enhance public knowledge about health and safety issues. An uninhibited debate about those issues that includes all interested and knowledgeable participants will lead, our constitutional system assumes, to the discovery of truth. *See Virginia State Bd.*, 425 U.S. at 770. For example, in the instant case, the public's search for truth will be aided by hearing the views of both Nike and its opponents with respect to the safety of labor conditions in overseas factories.

Thus, this Court's continued reliance on the "no more than" definition will not limit unduly the government's ability to regulate health and safety information and, in fact, will enrich the public discourse on those issues. The next section discusses an additional reason why the Court should adhere to the "no more than" definition – the inevitability that any broader definition would lead to abusive conduct and litigation by the plaintiffs' bar.

II. THE CALIFORNIA COURT'S DECISION, IF UPHELD, WILL PROVIDE AN UNACCEPTABLE BOON TO THE PLAINTIFFS' BAR

The California Court's decision bolsters plaintiffs' lawyers in two unacceptable ways. First, the decision expands the ability of plaintiffs' lawyers to commence frivolous, yet potentially lucrative, lawsuits under California's Unfair Competition Law ("UCL"). Second, and no less

importantly, the decision below enables the plaintiffs' bar to step up its practice of trying its lawsuits in the media.

A. The Decision Below Creates a New Category of Lucrative Lawsuits that Primarily Will Benefit Plaintiffs' Lawyers

Too many lawsuits in America are brought by lawyers seeking to line their own pockets, rather than serve the interests of the named plaintiffs. *See, e.g., In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012 (7th Cir. 2002), *cert. denied sub nom. Gustafson v. Bridgestone/Firestone, Inc.*, 123 S. Ct. 870 (2003) (decertifying class of purchasers of allegedly defective tires who had not suffered any physical injuries and who already had received free replacement tires); *Wood v. Wyeth-Ayerst Labs.*, 82 S.W.3d 849 (Ky. 2002) (rejecting class action claim seeking "medical monitoring" of users of Phen-Fen who had no present physical injury). The decision below, if upheld, will enable plaintiffs' lawyers to churn out, with relative ease, numerous new lawsuits alleging false commercial speech in violation of the UCL.

Opportunistic plaintiffs' lawyers should have no problem finding *Kasky*-like claims to file. Corporations routinely speak in the press about controversial issues (although their speech likely will be chilled by the decision below). A creative plaintiffs' lawyer should be able to read a few newspapers in the morning and come up with at least one possible UCL claim to file by lunchtime.

The plaintiffs' bar will rely on *Kasky* not only to file stand-alone UCL claims, but also as an adjunct to their product liability lawsuits. The chain of events is easily foreseeable. First, a plaintiffs' firm will attract media

attention to its product liability lawsuits, in order to influence the potential jury pool and find additional plaintiffs whom it can represent. Next, the targeted corporation, like any person who is attacked in the press, will seek to defend itself (unless its speech has been chilled) by making its own truthful statements to the media. Corporations feel compelled to defend themselves because, if they do not, a portion of the public will presume that they are guilty, and shareholders could suffer a decline in the value of their investment.

After the corporation defends itself, the California court's decision will come into play. Empowered by that decision, the plaintiffs' firm will add a UCL claim to its complaint against the corporation, alleging that the corporation's statements to the media were false. It will add that claim with two unacceptable goals in mind – to deter the corporation from communicating with the public and as an additional pressure point to extract a settlement from the corporation. Unfortunately, both of those goals likely will be accomplished under current California law as articulated by the court below.

As a separate matter, the nature of the UCL will make it easy for plaintiffs' lawyers, emboldened by the *Kasky* decision, to file copycat actions. Unlike the "little FTC Acts" in most states, California's UCL allows citizens to act as private attorneys general. Cal. Bus. & Prof. Code § 17204 (West 2003). In other words, the UCL allows plaintiffs' lawyers to commence lawsuits even when they cannot locate a claimant who actually has been deceived or harmed by the allegedly false advertising. Plaintiff Kasky, for example, explicitly alleges in his complaint that he has suffered no damage whatsoever as a result of Nike's statements.

Moreover, a plaintiff who successfully prosecutes a UCL action in a representative capacity could seek an award of attorney's fees. Under section 1021.5 of the California Code of Civil Procedure, the courts are empowered to award attorneys fees to "a successful party . . . in any action which has resulted in the enforcement of an important right affecting the public interest." The possibility of a fee award will, no doubt, provide an additional incentive to the plaintiffs' bar to identify and file UCL claims that rely on the California Supreme Court's broad definition of commercial speech. It comes as no surprise that this lawsuit was brought by some of the most prominent plaintiffs' class action lawyers in the nation.

This Court, by reversing the California court's decision, will prevent the plaintiffs' bar from releasing a torrent of abusive UCL claims – claims that rarely would benefit anyone outside the plaintiffs' bar, and that would cost our nation both economically and socially. As explained below, a reversal also is necessary because the California court's decision enhances the ability of plaintiffs' lawyers to manipulate the media.

B. The Decision Below Encourages the Plaintiffs' Bar to Increase Its Use of the Media to Influence the Outcome of Litigation

Plaintiffs' lawyers have become increasingly adept at using the media to advance their lawsuits. To be fair, they sometimes publicize legitimate issues concerning product safety. But many times, allegations concerning product safety that are made by the plaintiffs' bar turn out to be false or misleading.

The history of use of the media by plaintiffs' lawyers provides a basis for predicting how they will take advantage of the decision below. In case after case, the plaintiffs' bar has turned to the media to influence potential jurors, the judiciary and regulators. While there certainly are lawyers of integrity in the plaintiffs' bar, there also are some who are more concerned about a payday than learning the truth about product safety issues. If the California court's decision is allowed to stand, these lawyers will not only continue to use the media to influence the outcomes of their lawsuits, but will be emboldened to step up their media campaigns, knowing that the threat of a UCL claim will chill the countervailing voices of manufacturers.

Numerous examples exist of product safety claims that were pushed forward in the media by the plaintiffs' bar and that ultimately were proven meritless – from "sudden unintended acceleration" in Audi cars, to the alleged dangers of silicone breast implants, Norplant, Alar, Bendectin, and power lines. The first three of these examples will be explored in more detail below so as to show the history of extrajudicial use of the media by plaintiffs' lawyers, and to foreshadow the sort of conduct that will occur if the California court's decision is not overturned.

1. Examples of Prior Use of the Media by the Plaintiffs' Bar to Influence Litigation

a. "Sudden Unintended Acceleration" by Audi Cars

During the summer of 1986, a few lawsuits were filed alleging that the Audi 5000 had a design defect that caused the cars to accelerate suddenly when the transmission was shifted out of park, even when the driver was

pressing on the brake. Those claims entered the national consciousness later that fall when a now notorious segment of "60 Minutes" was aired. The segment featured an Ohio mother who accidentally and tragically had run over her six-year-old son with her Audi 5000, and who claimed that she had her foot on the brake the whole time.[5]

Unbeknownst to the viewers, plaintiffs' lawyers were lurking behind the scenes of the "60 Minutes" segment. The broadcast relied heavily on an "expert" on automobile safety named William Rosenbluth. But Rosenbluth did not disclose in the segment that he already had been retained by lawyers who were representing the Ohio family in its lawsuit against Audi. Moreover, Rosenbluth misled viewers when he performed a demonstration on "60 Minutes" of an accelerator pedal moving down apparently by itself. Rosenbluth, the expert hired by a plaintiffs' firm, had drilled a hole in the car's transmission and pumped in air or fluid so that the accelerator pedal would be depressed without the assistance of a human foot.[6]

The "60 Minutes" program created tremendous publicity and sympathy for the "sudden unintended acceleration" theory. By 1989, Audi was facing more than one hundred lawsuits seeking combined damages totaling

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[5] *See* Peter W. Huber, *Manufacturing the Audi Scare*, Wall St. J., Dec. 18, 1989, *available at* 1989 WL-WSJ 457495; Peter W. Huber, Galileo's Revenge: Junk Science in the Courtroom 559-62 (Basic Books 1991).

[6] *See id.*; Walter Olson, *It Didn't Start with Dateline NBC*, Nat'l Review, June 21, 1993, available at http://www.walterolson.com/articles/crashtests.html.

$5 billion.[7] Demand for Audi vehicles plummeted and some dealers went out of business.

Eventually, the real facts came out. Comprehensive reviews by the National Highway Traffic Safety Administration and its counterparts in Canada and Japan concluded that the cause of sudden acceleration in the Audi 5000 was not a design defect, but drivers who accidentally placed their feet on the wrong pedal.[8]

Because the "sudden unintended acceleration" claims were made in the pre-*Kasky* era, Audi did not hesitate to refute the claims in the press. If the California court's decision were on the books at that time, however, Audi might have been chilled from expressing its views for fear that its comments could give rise to a UCL claim. Likewise, unless the decision below is reversed, unscrupulous plaintiffs' lawyers will be encouraged by that decision to continue their misleading submissions to the media, believing that the party best suited to rebut misleading claims about a product's safety – the manufacturer – will choose silence rather than risk a UCL claim.

b. Silicone Breast Implants

Silicone breast implants were the subject of a health scare throughout the 1990s. The scare started in 1990 when Connie Chung ran a segment on her show alleging

[7] Peter W. Huber, *Junk Science in the Courtroom*, Forbes, July 8, 1991, at 68, *available at* 1991 WL 2802206.

[8] *Id.*; James R. Healey & David Kiley, *PR Company Comes Up with 2 Campaigns Taking SUVs to Task*, USA Today, Jan. 24, 2003, at 3B, *available at* LEXIS, News Library, at Major Papers File.

that the implants cause autoimmune, neurological and other diseases. Within the following four years, an avalanche of lawsuits was filed against the various manufacturers of the implants. For example, Dow Corning was named as a defendant in approximately 20,000 lawsuits.[9]

But by the mid-1990s, the plaintiffs' lawyers had a problem. The public was becoming increasingly convinced that the breast implant litigation rested on "junk science."[10] To save their lawsuits, the plaintiffs' bar launched a nationwide media campaign designed to combat the "junk science" accusation.[11] They retained under a multimillion dollar contract a public relations firm named Fenton Communications.[12] Fenton had the right qualifications for the job, as it previously had been successful in attracting media attention and fomenting fear with respect to the Alar scare.[13]

[9] Michael Fumento, *A Confederacy of Boobs: How Special Interests, Assorted Ideologues, and a Sensationalist Press Torpedoed Breast Implants and Now Threaten Other Medical Devices*, Reason Magazine, Oct. 1995, *available at* LEXIS, News Library, Magazine File.

[10] Ann Davis, *Plaintiffs: We'll Junk "Junk Science" Tag*, Nat'l L.J., Dec. 2, 1996, at A6, *available at* LEXIS, News Library, Papers File.

[11] *Id.*

[12] *Id.*; David K. Martin, *Truth Prevails Over "Junk Science,"* Chi. Trib., Sept. 2, 1998, at 25, *available at* 1998 WL 2891543; Michael Fumento, *The FDA's Panel Did Not Recommend the Ban of Silicone Breast Implants*, Wash. Times, Jan. 21, 1999, at A18, *available at* 1999 WL 3076271; Michael Fumento, *Dwindling Implant Returns*, Wash. Times, Dec. 28, 1998, at A17, *available at* 1998 WL 3467312; *A "Sleazy" Attack*, Wall St. J. Eur., Feb. 19, 1997, at 10, *available at* 197 WL-WSJE 3806723.

[13] *A "Sleazy" Attack*, *supra* note 12, at 10; Bonner R. Cohen, *Scaring Up Money with False Attacks On Science*, Knight Ridder/Trib.

(Continued on following page)

The substantial financial investment made by the breast implant lawyers in their media campaign paid dividends. After hiring Fenton, the plaintiffs' lawyers dramatically improved their success rate in defending *Daubert* motions, and filled their pockets with million of additional dollars from settlements and judgments.

While the media campaign launched by the plaintiffs' bar served them well, it could not ultimately prevent the truth from being established. In 1999, Congress received a report from the Institute of Medicine, which it had asked to study the breast implant issue. The independent panel of 13 scientists reported that there is no reason to believe that the implants are toxic, cause harmful effects on the immune system, or give rise to a unique disease syndrome.[14]

The history of the breast implant litigation illustrates why the California court erred in depriving companies of the same level of First Amendment as is received by their attackers. No matter how much the plaintiffs' bar tries to characterize its tort lawsuits against large corporations as "David versus Goliath" stories, the truth is that the plaintiffs' bar is a gigantic industry unto itself. The plaintiffs' bar does not blink at spending millions of dollars on media efforts to support its lawsuits. Basic principles of fairness, as well as the public's interest in learning the truth, require that manufacturers receive the same level of

Bus. News, Sept. 20, 2000, *available at* LEXIS, News Library, Papers File (characterizing Fenton Communications as an expert at "fomenting fear among consumers" and noting its involvement in the Alar scare).

[14] Gina Kolata, *Panel Confirms No Major Illness Tied To Implants*, N.Y. Times, June 21, 1999, at A1, *available at* 1999 WL 30483238.

constitutional protection for their responses as do the plaintiffs' lawyers who sponsor those attacks.

c. Norplant

After the plaintiffs' lawyers put Dow Corning out of business, they targeted another product – Norplant. When it was launched in the early 1990s, Norplant – six tiny hormone-releasing rods that are implanted under the skin – was heralded as a breakthrough in contraception due to its 99 percent effectiveness in preventing pregnancy. But the tort lawyers soon swarmed around Norplant, bringing along with them many of the same medical experts and laboratories that had made money in the breast implant litigation.[15]

The plaintiffs' lawyers had honed their media strategy by the time they zeroed in on Norplant. They used billboards, television advertisements and media scare campaigns to recruit 50,0000 women to sue the manufacturer.[16] The expense associated with this media campaign was not a problem for the plaintiffs' lawyers, as they had accumulated a sizable war chest from their previous lawsuits.

The media hype, however, could not be justified by the "scientific" evidence collected by the plaintiffs' lawyers. The results in the litigation attest to the shoddy quality of that evidence. As of 1999, the manufacturer of Norplant

[15] Gina Kolata, *Will the Lawyers Kill Off Norplant?*, N.Y. Times, May 28, 1995, § 3, at 1, *available at* LEXIS, News Library, Northeast File.

[16] Leslie Laurence, *Your Perfect Birth Control ... Blocked?*, Glamour, Sept. 1999.

had won three jury verdicts, 20 pretrial judgments, and the dismissal of 14,000 claims.[17] Last year, a United States District Judge sitting in Texas dismissed the claims of most remaining class members, finding that, "Plaintiffs have not produced a shred of evidence or expert testimony that supports an association between Norplant" and the diseases in question.[18]

The ongoing Norplant litigation shows that the plaintiffs' bar has not stopped using the media as part of its case strategy, and remains willing to commence massive tort litigation without solid scientific support for its claims. In this environment, it is especially important that the public hear the voices of those persons best suited to answer the allegations of the plaintiffs' bar. This is not the time for silencing the companies that have the incentive and knowledge to rebut junk science.

As demonstrated by the three examples discussed above, plaintiffs' attorneys consider extrajudicial use of the media to be one of the tools of their trade. Unless the California court's decision is vacated, plaintiffs' attorneys can be expected to ramp up their use of the media, knowing that their public statements are less likely to be challenged by the companies whom they sue. For the sake of promoting robust debates that ultimately reveal the

[17] Charles Ornstein, *Norplant Company Agrees to Settle Suits*, Dallas Morning News, Aug. 26, 1999, *available at* LEXIS, News Library, Papers File.

[18] *In re Norplant Contraceptive Prods. Liab. Litig.*, 215 F. Supp. 2d 795, 833 (E.D. Tex. 2002).

truth about the health and safety of products, the decision below should be reversed.

CONCLUSION

For the foregoing reasons, *amicus curiae* Product Liability Advisory Council, Inc. respectfully asks this Court to reject the Supreme Court of California's unduly broad definition of commercial speech, reverse the decision below, and, in so doing, reiterate and reinforce its definition of commercial speech as "speech that does no more than propose a commercial transaction."

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The Toro Company

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